



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 44 OF 2012

RACHAEL NYAMBURA MURAYAPLAINTIFF

VERSUS

MARGARET WAIHERA NJIHIADEFENDANT

JUDGMENT

(Suit by plaintiff for eviction of defendant from suit property; counterclaim by defendant for the same property; parties having entered into a sale agreement for purchase by defendant's deceased husband of the suit property; mistakenly, the transfer registered being of the property of the plaintiff; clear evidence of mistake; order issued for cross-transfer of the properties)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint which was filed on 31 October 2012. It is pleaded in the plaint that the plaintiff is the owner of the land reference number 18502/28 (the suit property or plot No. 28) situated East of Naivasha Township, in Nakuru County. It is pleaded that the defendant has wrongfully entered into the land and taken possession of it. In the suit, the plaintiff wants the defendant evicted from the suit property; a permanent injunction; mesne profits of Kshs. 10,000/= from January 2012 which is said to be the date that the defendant was asked to vacate; and interest on mesne profits from January 2012 till possession is delivered. The plaintiff has also asked for costs of the suit.

2. The defendant filed defence and counterclaim. In the defence, the defendant admitted that the plaintiff is the owner of the suit property but she pleaded that she is on the land lawfully after her husband purchased it from the plaintiff. She has averred that a mistake was committed by the plaintiff's daughter, one Betty Muraya, who is also the advocate who handled the transaction. It is stated that she misrepresented the particulars of the sale and interchanged the suit property with the land reference number 18052/27 (plot No. 27), which is adjacent to the suit property, and which is now registered in the name of the defendant's deceased husband. She has pleaded that while he was alive, her husband sought to rectify the anomaly, but upon his demise, the plaintiff has become adamant and wants to evict her. In the counterclaim, she has pleaded that there was an honest mistake and that an order should issue to the Registrar of Titles to rectify the register. She has pleaded that she has settled on the suit property whereas the other property is vacant and therefore the plaintiff does not stand to suffer any loss. She has also asked that the plaintiff do indemnify the defendant for any costs and damages that may arise during the process of rectification.

3. The plaintiff filed a reply to defence and defence to counterclaim. She denied that the defendant's husband purchased the suit property and denied any knowledge of any misrepresentation. She denied that there was any confusion during the process of title and denied that there was any change of the properties. She further pleaded that the orders sought by the defendant cannot be granted as the Registrar of Titles has not been enjoined in the proceedings. She asserted that what the defendant's husband purchased was the plot No. 27 and not the suit property which is plot No. 28.

B. EVIDENCE OF THE PARTIES

4. PW-1 was one David Kibiaru Muraya who holds a power of attorney donated by the plaintiff. He is also a son of the plaintiff. He testified that no mistake was made during registration of the title. He stated that while the defendant's now deceased husband was alive, there were negotiations with his mother, for a cross transfer since a mistake had occurred but the issue of costs was still an issue not agreed upon. When negotiations failed, notice was issued that Mr. Njihia (the defendant's husband) vacates the land. He testified that Njihia died on 5 December 2011. A letter was issued to the defendant and she stated that she was willing to do the cross-transfer but she did not have letters of administration. They therefore asked her to vacate as they intended to sell the land so as to raise money to get a pacemaker for their mother who has a heart ailment. In cross-examination, he testified that the plaintiff entered into an agreement with the defendant for the plot No. 28 and it is not clear how the two properties were interchanged. He stated that because of the developments in the suit property, the plaintiff is willing to a cross transfer.

5. The defendant testified that her husband purchased the suit property. She testified that they were shown the land by an agent. An agreement was drawn by Betty Muraya, the daughter of the seller. After completion of the purchase price, they put up a fence and developed the land. They planted trees, built a dam and some houses for their workers. Unfortunately her husband died in October 2011. In the year 2010, while her husband was still alive, the plaintiff asked them to vacate and he replied to the letter. She testified that her husband did not sign the transfer instrument. In cross-examination, she insisted that the land they purchased was parcel No. 28. She admitted filing a succession cause and giving particulars of the titles to the succession court. She testified that before her husband died, he had asked for the properties to be re-transferred. She testified that they have no interest in the parcel No. 27.

6. DW-2 was one John Muthaa Munge. He sells health supplements. He testified that he knew the defendant's late husband as he used to attend to him. In the course of their interaction, he informed him of the problem over the land. He testified that he went to the land and saw the developments that had been made by the deceased.

C. SUBMISSIONS OF COUNSEL

7. In his submissions, Mr. Kiura for the plaintiff, inter alia submitted that the defendant tendered the property No. 27 as forming part of the estate of her deceased husband. He also pointed out that the defendant never led any evidence to pursue her claim for rectification of title. He submitted that the defendant intends to retain the plot No. 27 for the deceased estate but still continue occupying the suit property. He submitted that the developments made on the suit property are no justification or defence to the continuing trespass. He further submitted that the valuation of the mesne profits has not been challenged and should be granted as prayed. He relied on four authorities which I have taken note of.

8. In his submissions, Mr. Tumuti for the defendant, submitted that the defendant's husband purchased the suit property on 31 July 1995, and it is only after 15 years of occupation that the letter dated 30 September 2010 was issued, informing him that he is a trespasser. He submitted that the defendant's

late husband purchased the plot No. 28 which he submitted is shown in the sale agreement. He submitted that the plaintiff wants to sell the suit property because it is now of higher value owing to the developments on it. He submitted that the defendant's late husband did not execute any transfer of the suit property and it was his view that the transfer of the plot No. 27 to the defendant's deceased husband was a fraudulent transfer. He asked that the plaintiff's case be dismissed and the title corrected. He relied on the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) eKLR*.

D. DECISION

9. I have considered the pleadings, the evidence and submissions of counsel. There is no contention that the plaintiff entered into an agreement for sale of land with the husband of the plaintiff, Francis Njihia (deceased). I have looked at a copy of the sale agreement which is dated 31 October 1995. It shows that the property being sold is the land parcel L.R No. 18502/28. The agreement was witnessed by Betty Muraya Advocate. This agreement is preceded by a letter dated 2 October from M/s Betty Muraya & Company Advocates which asked the deceased to confirm whether he would wish to have them transfer the property L.R No. 18502/28 to the deceased. This was accepted by the deceased on 18 November 1995. On 30 September 2010, PW-1 wrote to the deceased informing him that he may have taken possession of the wrong plot instead of the plot No. 27. The deceased wrote back and asserted that what he purchased was the plot No. 28. It appears as if the parties tried to negotiate the matter, and indeed an offer was made by the plaintiff to have a cross-transfer of the two properties, demonstrated by a letter dated 18 May 2011 written by counsels for the plaintiff. For reasons which I am unable to tell, this offer appears not to have been accepted by the deceased, and the plaintiff got the impression that the deceased wanted to retain both parcels of land. Njihia died on 28 October 2011, and on 5 December 2011, the plaintiff asked the defendant to vacate the suit premises. The defendant did not vacate hence this litigation.

10. PW-1 did not actually deny the contents of the agreement of 1995. He indeed testified that it is not clear how the two properties were interchanged. In as much as the pleadings show that the plaintiff wants the defendant to vacate the suit property, PW-1 testified that the plaintiff is willing to do a cross-transfer. That is exactly what the defendant has also asked for in her counterclaim. I appreciate that the defendant is not the registered proprietor of the land parcel No. 27 but she is the administrator of the estate of the registered proprietor. I am rather at a loss why the parties herein could not enter into a consent given that they appear to be reading from the same page, that the registration of the plaintiff as owner of the suit property and the registration of the deceased as owner of the plot No. 27 was made by mistake, as the property that was sold to the deceased was the suit property and not Plot No. 27.

11. I am convinced that a mistake occurred in the manner in which the properties were transferred. I do not have any evidence before me that the advocate who handled the transaction acted fraudulently, and I am hesitant in holding that there was any fraud, but I have ample evidence that the parties intended to have the deceased registered as proprietor of the land parcel No. 28 but he ended up being registered as owner of the parcel No. 27. The fact that the defendant and her deceased husband developed the land parcel No. 28 and settled on it for over 15 years, with the plaintiff raising no issue, also lends credence to the determination that the plaintiff was aware that the property that ought to have belonged to the deceased was the suit property. It could be that the fact that Mr. Njihia passed on, and the defendant proceeded to file a succession cause for the land parcel No. 27, derailed the plaintiff and made her feel that her options are limited, and that is why she has now asked the defendant to vacate the suit property. But I think that the issue may be resolved if I ordered the Registrar of Titles or his successor, to cancel the registration of the plaintiff as owner of the plot No. 28 and have her registered as proprietor of the plot No. 27, and similarly, direct that the plot No. 28 be registered in the name of the deceased. That to me seems to be the fairest order given the circumstances of this case. I am aware

that the defendant has undertaken succession proceedings and noted that the deceased owned the parcel No. 27. In this respect, I direct that the defendant do make the necessary application to have the grant rectified. I otherwise direct the Registrar of Titles, or his successor, not to act on any grant tendered by the defendant in so far as the same provides that the estate of the deceased comprises the land parcel No. 27.

12. On the question of mesne profits, I think the same is misplaced as the defendant is not on land that is supposed to be owned by the plaintiff. I also think that in the circumstances of this suit, each party ought to bear her own costs.

13. I believe that I have dealt with all issues herein and now make the following final orders :-

1. *A declaration is hereby issued that the registration of Rachael Nyambura Muraya as proprietor of Land Reference No. 18502/28 and the registration of Francis Njihia Gitau as proprietor of Land Reference No. 18502/27 was made by mistake.*

2. *That a declaration is hereby issued that the correct proprietorship ought to be that Rachael Nyambura Muraya is the proprietor of the Land Reference No. 18502/27 and Francis Njihia Gitau is the proprietor of the Land Reference No. 18502/28.*

3. *That an order is hereby issued to the Registrar of Titles and/or his successor in title to rectify the registers of the two land parcels and reflect Rachael Nyambura Muraya as the proprietor of the Land Reference No. 18502/27 and Francis Njihia Gitau as the proprietor of the Land Reference No. 18502/28.*

4. *That any cost required to effect the cross-transfers be shouldered equally by the plaintiff and the defendant.*

5. *That a declaration is hereby issued that the property Land Reference No. 18502/27 does not comprise part of the estate of Francis Njihia Gitau.*

6. *That the defendant is hereby ordered to effect amendment to the documents filed in the succession matter filed in respect of Francis Njihia Gitau, so that the same may reflect that the property of the deceased is Land Reference No. 18502/28 and not Land Reference No. 18502/27.*

7. *That there shall be no orders as to costs.*

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of November 2015.

MUNYAO SILA

JUDGE

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In presence of : -

Mr Opondo holding brief for Mr Tumuti for the defendant .

N/A on part of M/s Riunga Raiji & Co Advocates for plaintiff.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU



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